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No. ....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

ARTHUR H. MARIENFELD,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Arthur H. Marienfeld, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case July 12, 1954, on which motion for rehearing was denied August 10, 1954.

I.

OPINIONS BELOW.

An opinion on the question of double jeopardy by the District Judge is not reported. A copy appears in the printed record printed for the Court below (R. 300). The opinion of the District Judge on the Motion for New Trial is reported in 116 F. Supp. 634. That opinion is printed in the record for the Court below (R. 308). The opinion of

the Court of Appeals for the Eighth Circuit (Collet, Sanborn, and Johnsen, Circuit Judges) has not yet been reported. A copy of that opinion as certified by the Clerk of the Court of Appeals for the Eighth Circuit, is appended. There was no opinion on the Motion for Rehearing. The order overruling the same appears in the record as certified to by the Clerk of the Court of Appeals for the Eighth Circuit and filed in this Court.

II.

STATEMENT OF JURISDICTION.

(1) The Court of Appeals for the Eighth Circuit affirmed the judgment of conviction in this case by opinion dated July 12, 1954, upon which judgment was entered July 12, 1954.

(2) Petitioner filed a petition for rehearing on July 26, 1954, within the time allowed by the rules of the Court of Appeals for the Eighth Circuit, which petition was duly entertained and denied on August 10, 1954, which order provided that mandate would issue twenty days after that date of August 10, 1954. Application for stay of mandate pending application to this Court for writ of certiorari was filed August 12, 1954, which application was sustained on August 17, 1954, staying the issuance of the mandate for a period of thirty days from that date.

(3) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

III.

QUESTIONS PRESENTED.

(1) Did the Court of Appeals err in holding that it is immaterial whether petitioner was guilty of embezzlement under the law of Missouri in determining whether the

funds received by petitioner from the sale of Stokely property constituted taxable income to him?

(2) Did the Court of Appeals err in holding that petitioner received taxable income consisting of proceeds of the sale of property belonging to Stokely which petitioner sold for Stokely's account and was to promptly remit to them, but which instead he lost gambling?

(3) Did the Court of Appeals err in holding that this case is not governed by the case of Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, but instead is governed by the case of Rutkin v. United States, 343 U. S. 130?

(4) Did the Court of Appeals err in holding that embezzled funds constitute income taxable to the embezzler?

(5) Did the Court of Appeals err in holding, in spite of the decision of this Court in the Wilcox case in 1945, and in spite of General Counsel's memorandum 24945 issued in 1946, that funds embezzled in 1946 and not condoned by the owner, constituted taxable income in 1946 and that petitioner could be convicted for failure to report same in his tax return filed in the spring of 1947?

(6) Did the Court of Appeals err in holding that it was not error to exclude evidence of the audit by petitioner's certified public accountant of his determination from the voluminous records in evidence of the amount not remitted by petitioner to Stokely in 1946?

(7) Did the Court of Appeals err in holding that refusal by the Court of a charge that petitioner could not be convicted if, in fact, no additional tax was due, was not error?

(8) Did the Court of Appeals err in holding that it was not error to deny petitioner's plea of double jeopardy?

IV.

STATUTES INVOLVED.

The provision of the Federal Constitution involved is the Fifth Amendment, which is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Federal Statutes involved are 53 Stat. 62, as amended Oct. 21, 1942, 4:30 P. M., E. W. T., c. 619, Title I, §§ 136 (b, c), 172 (f) (3), 56 Stat. 836, 893; June 9, 1943, 7 p. m., E. W. T., c. 120, § 5 (c), 57 Stat. 144; May 29, 1944, 7 p. m., E. W. T., c. 210, Part I, § 6 (b) (6), 58 Stat. 234 [Title 26, United States Code, Section 145 (b)], and is as follows:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon convic-

tion thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The statutes of the State of Missouri involved are Sections 560.250, 560.260 and 560.340, Vernon's Annotated Missouri Statutes, which are as follows:

Section 560.250, Embezzlement by clerk or agent.

"If any agent, clerk, apprentice, servant or collector of any private person, or of any copartnership, except persons so employed under the age of sixteen years, or if any officer, agent, clerk, servant or collector of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employer, any money, goods, rights in action, or valuable security or effects whatsoever, belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for stealing property of the kind or the value of the articles so embezzled, taken or secreted (R. S. 1939, Par. 4471)."

Section 560.260, Embezzlement by bailee.

"If any carrier, bailee or other person shall embezzle or convert to his own use, or make away with or secrete, with intent to embezzle or to convert to his own use, any money, goods, rights in action, property or valuable security or other effects which shall have been delivered to him, or shall have come into his possession or under his care as such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, he shall, on convic-

tion, be punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, taken or secreted (R. S. 1939, Par. 4473)."

Section 560.340, Conversion of goods for own use by agent—penalty.

"If any warehouseman, storage, forwarding or commission merchant, or any other person selling on commission or for a percentage on sales made by him, or any person receiving goods on condition that he is to pay a certain price or value to the owner or shipper when such goods are sold, or if the agent, clerk or servant of any such person shall convert to his own use any produce, cattle, hogs, cotton, flour or other property of any description whatsoever, or the proceeds or avails thereof, without the consent of the owner thereof, or shall fail to pay over the proceeds or avails thereof, less his proper charges, on the demand of the person entitled thereto, or his duly authorized agent, he shall be adjudged guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars nor less than one hundred dollars, or confined in the county jail or workhouse not longer than one year nor less than sixty days, or shall be punished by both such fine and imprisonment, and shall be liable to the person injured in double the value of the property or money so converted (R. S. 1939, Par. 4503)."

The opinion of the Chief Counsel of the Bureau of Internal Revenue involved is 1946-13-12335, G. C. M. 24945, reported in Internal Revenue Bulletin, Cumulative Bulletin 1946-2, July-December, 1946, which is as follows:

"Section 29.22 (a)—1: What included in gross income. 1946-13-12335 G. C. M. 24945

"**Internal Revenue Code and Prior Revenue Laws.**

"The mere act of embezzlement does not of itself result in taxable income to the embezzler for Federal income tax purposes. If the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case.

"G. C. M. 16572 (C. B. XV-1, 82 [1936]) modified.

"In G. C. M. 16572 (C. B. XV-1, 82 [1936]) it was held, on the basis of court decisions then available, that the proceeds of an embezzlement constitute taxable income in the hands of the embezzler for Federal income tax purposes.

"In the case of Commissioner v. Wilcox et al. (327 U. S. ..., Ct. D. 1668, C. B. 1946—1, 6), decided by the Supreme Court February 25, 1946, it was held that moneys embezzled by a bookkeeper from an employer are not taxable income to the embezzler under section 22 (a) of the Internal Revenue Code, where the employer never condoned nor forgave the taking of the money and still holds the employee liable to restore it. The fact that the employee was convicted and sentenced, but paroled after serving part of his prison term, did not affect this conclusion. The Court stated that not every benefit received by a taxpayer from his labor or investment necessarily renders him taxable, nor is mere dominion over money or property decisive, but all relevant facts and circumstances must be considered. The Court pointed out that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite, unconditional obligation to repay

or return that which would otherwise constitute a gain. The Court also stated that without some bona fide legal or equitable claim, the taxpayer can not be said to have received any gain or profit within the reach of section 22 (a) of the Internal Revenue Code. The Court commented that if the unconditional indebtedness is canceled or retired, taxable income may adhere, under certain circumstances, to the taxpayer.

"In view of the decision of the Supreme Court in Commissioner v. Wilcox et al., it is the opinion of this office that the principles stated in G. C. M. 16572, supra, are too broad inasmuch as that memorandum can be construed as holding that embezzlement results in taxable income in all cases. The correct rule appears to be that the mere act of embezzlement does not of itself result in taxable income inasmuch as the owner does not lose title to the property embezzled. However, where the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case.

"G. C. M. 16572, supra, is modified accordingly.

J. P. Wenchel,
Chief Counsel, Bureau of
Internal Revenue."

V.

STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted in the District Court for the Eastern District of Missouri under Title 26, United States Code, Section 145 (b). The indictment contained two Counts; the first charging petitioner with filing in the Eastern District of Missouri a false and fraudulent individual income tax return for the year 1946 and the second count

charging the filing in the Eastern District of Missouri of a false and fraudulent corporation return for Mar Meat Company, of which the petitioner was President, for the fiscal year ending October 31, 1947 (R. 2-5). Petitioner was tried by jury. The Court sustained a motion to dismiss the second Count (R. 324), but the jury convicted the petitioner on Count 1 (R. 300).

The Government offered evidence which it contended showed unreported taxable income by petitioner for the year 1946. One Government witness placed the sum at $37,296.56 (R. 112) in computing additional tax due. Another agent based his testimony on an alleged unreported sum of $30,296.56 (R. 119). The Government offered in evidence certain unnumbered dray tickets constituting the alleged unreported income which were not, in fact, reflected in petitioner's income tax return (R. 107-111).

It was the contention of petitioner that he had a boning contract to bone beef and pork carcasses for Stokely Foods, Inc., under which contract the by-product belonged to Stokely and petitioner was to sell the by-product of the boning operation for Stokely's account and was to remit to them in full. The evidence on this, consisting of testimony of petitioner (R. 144-145) and representatives of Stokely Foods, Inc. (R. 128-129, 121-122), was undisputed.

Petitioner contended that some of the proceeds of the sale of Stokely's by-product were lost by him in gambling (R. 113, 202) and he did not report or remit in full to Stokely (R. 113, 188, 202). Petitioner contended that he sought to keep track of the amount due Stokely by entries on these unnumbered dray tickets (R. 100, 190, 205, 208).

The Trial Judge refused to admit testimony of a certified public accountant, Charles R. English, employed by petitioner to make an audit of his records. The certified

public accountant sought to testify that he had examined the books and records, which were in evidence, and were in the court room, and from that examination, plus the parol testimony in the course of the trial, to testify as to the amount which petitioner had not remitted to Stokely in 1946 from the sale of their by-product (R. 245-246).

It was petitioner's contention that money received by him as receipts of the sale of Stokely's property, which he was to sell for them and remit in full, was not his money, was not income to him and should not have been included in his tax return. It further was petitioner's contention that when the amount due from him to Stokely for 1946 was computed it equaled or exceeded the amount which the Government claimed by the indictment and by the evidence was unreported taxable income, that this amount to Stokely was not taken into account in his return for 1946, and that when it was taken into account no additional tax was due. The Court of Appeals held that such accounting testimony normally would be admissible in evidence, but that it was not error in this instance to exclude it on the basis that the testimony was designed to show the amount of funds embezzled by petitioner from Stokley and that, since such funds were taxable income, the exclusion of the testimony showing the amount was immaterial (Opinion—App. p. 37). The Court of Appeals further held that the refusal by the Trial Court of a charge that the petitioner could not be convicted if, in fact, no additional tax was due, was not error. The reasoning of the Court on this last question was also based on the contention that the embezzled funds constituted taxable income and could not be excluded in determining the taxable income of the petitioner, and hence there was no basis for that requested charge (Opinion—App. p. 38).

The Court of Appeals' opinion recognizes that a primary question for determination by it was whether converted proceeds received from the sale of by-products belonging

to Stokely was Stokely's money, which did not constitute income to petitioner, or whether those proceeds were reportable income by petitioner (Opinion—App. p. 32).

The Court of Appeals, in its opinion, then recognizes that under the case of Commissioner of Internal Revenue v. Wilcox (327 U. S. 404), this Court "flatly held that embezzled funds were not taxable income to the embezzler" (Opinion—App. p. 34). The opinion recognizes that petitioner's brief points out that the retention of Stokely funds by petitioner constituted embezzlement under the Missouri statute. The Court's opinion does not undertake to establish or even contend otherwise, but says: "The present question is not whether appellant was guilty of embezzlement under the law of Missouri" (Opinion—App. p. 32). The Court's opinion then goes on to hold that on authority of this Court in Rutkin v. United States (343 U. S. 130), it would affirm the conviction of petitioner, even though the Rutkin case dealt with extortion rather than embezzlement, and even though the majority opinion in the Rutkin case expressly recognized that it left standing the Wilcox case, which dealt with the taxability of embezzled funds (Opinion—App. p. 36).

The majority opinion of the Court of Appeals undertakes to draw a distinction in the facts between this case and the Wilcox case. It states that there is no distinction between the cases with reference to the existence of a bona fide legal or equitable claim to the property. It further states that the only possible difference between the two cases is that in the case at bar the obligation of the petitioner to remit to Stokely was delayed (until he reported to Stokely what was sold and the amount received and it sent him a memo of the amount due), whereas, in the Wilcox case the obligation to pay was said to be instantaneous (Opinion—App. pp. 34-35). On the basis of that alleged distinction, the majority opinion of the Court of Appeals infers a right of use in said funds in petitioner

(Opinion—App. pp. 35-36). That is the basis of the Court's decision that this case is governed by the Rutkin, rather than the Wilcox case. Petitioner's position is that the evidence disclosed no right of use of Stokley money in him at all, but, rather, that he was to sell Stokley property for their account and remit to them in full (R. 129, 144, 145). Hence, there is not even the slight distinction attempted to be drawn by the majority opinion of the Court of a temporary right of use in petitioner. It was never intended that petitioner was to have the right of use of Stokely money.

This case first was tried to a jury in a trial commencing June 29, 193, and ending July 6, 1953 (R. 321-322). After approximately five and a half hours of actual deliberation the jury sent a note to the Court that they could not agree. Actually, the note was not displayed to petitioner or his counsel or read to them. It will be noted that the stenographic transcript of what occurred at the time does not show the filing of this note (R. 14). The note first got into the record in a later memorandum by the Judge (R. 301). The jury was brought into the court room and the Trial Judge started what is known as the "mallet instruction" (R. 18). About half way through that instruction the Judge asked how the jury stood numerically, and cautioned them not to disclose how they stood as between the defendant and the Government. When the foreman announced that there were eight for conviction and four for acquittal the Trial Judge immediately, without any request from or inquiry of petitioner or his counsel, discharged the jury (R. 18-19). The mallet instruction was not completed.

Subsequently, before the second trial was conducted, petitioner filed a motion to be discharged, on the ground that to try him again would constitute double jeopardy (R. 12), on the basis that he was entitled to have the case decided by the jury in the first trial, and that the record

disclosed that the jury was discharged, not for inability to agree, but, rather, it was discharged (and the mallet instruction left uncompleted), because the jury foreman disclosed how the jury stood as between the Government and the defendant. Petitioner's motion contended that to retry him under these facts would constitute double jeopardy, in violation of the Fifth Amendment to the Federal Constitution.

VI.

REASONS FOR GRANTING WRIT.

(1) The decision below is in conflict with the decision of this Court in Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, and with the decisions of other Courts of Appeal on the same subject. See Commissioner of Internal Revenue v. Turney, 5 Cir., 82 F. (2d) 661, and McKnight v. Commissioner of Internal Revenue, 5 Cir., 127 F. (2d) 572.

In Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, l. c. 408, this Court said:

> "Under Nevada law, the crime of embezzlement was complete whenever an appropriation was made; the employer was entitled to replevy the money as soon as it was appropriated, or to have it similarly restored by a Magistrate. The employer, moreover, at all times held the taxpayer liable to return the full amount. The debtor-creditor relationship was definite and unconditional. All right, title and interest in the money rested with the employer. The taxpayer thus received no taxable income from the embezzlement.
>
> "This conclusion is unaltered by the fact that the taxpayer subsequently dissipated all of the embezzled funds in gambling houses."

The majority opinion of the Court of Appeals recognizes (Opinion—App. p. 32) that the primary question to

be decided is, "Was the income received from the sale of the converted by-products reportable income of appellant, or was it Stokely money which appellant did not obtain such a priority interest in or dominion over as to constitute income to him?"

In determining this question the Court of Appeals does not undertake to do what this Court did in the Wilcox case, namely, determine whether the funds constituted embezzled funds. The Court of Appeal's opinion recognizes that petitioner cited statutes and decisions of Missouri to show that what was done constituted embezzlement under the law of Missouri, but then the opinion goes on to state (Opinion—App. p. 32):

> "But the present question is not whether appellant was guilty of embezzlement under the law of Missouri, but whether the funds he received were his income under the act of Congress defining taxable income."

Unquestionably this Court in the Wilcox case held that embezzled funds are not taxable income to the embezzler. The majority opinion below recognizes that when it says:

> "Since the Court in Commissioner v. Wilcox flatly held that embezzled funds were not taxable income to the embezzler * * *."

(Opinion—App. p. 34) There was no common law offense of embezzlement. It is wholly statutory; yet the opinion of the Court of Appeals holds that the laws of Missouri (where the acts occurred) on embezzlement are immaterial. In other words, the opinion in effect says that even though these were embezzled funds, still we hold that they were taxable income to petitioner. That, we submit, is in direct conflict with this Court's decision in the Wilcox case wherein the Court first looked to the law of the forum of Nevada and determined that the funds were embezzled

funds and then determined that they were not taxable income to the taxpayer.

In the case now before this Court it is undisputed that the boning contract between Stokely Foods, Inc., called for petitioner to sell Stokely by-products of the boning operation and to remit in full to Stokely the proceeds received from said sales (R. 128-129, 121-122, 144-145). Petitioner lost some of the money gambling (R. 113, 202) and did not report that part or remit it to Stokely. He sought to keep account of the amount on unnumbered dray tickets so he could repay Stokely (R. 190, 205, 208), but actually what he did constituted embezzlement under the law of Missouri, just as what Wilcox did was embezzlement under the law of Nevada. Vernon's Annotated Missouri Statutes, Sections 560.250, 560.260 and 560.340; State v. McCawley, 180 S. W. 862 (Mo. S. C.); State v. Britt, 213 S. W. 425, 278 Mo. 510; State v. Coster, 157 S. W. 85, 170 Mo. App. 539; State v. January, 182 S. W. (2d) 323, 353 Mo. 324. It also constituted embezzlement under Federal decisions: Morissette v. U. S., 342 U. S. 246, l. c. 271-2; Tredwell v. U. S., 4 Cir., 266 F. 350, certiorari denied, 253 U. S. 496; Weinhandler v. U. S., 2 Cir., 20 F. (2d) 359; Spencer v. U. S., 8 Cir., 169 F. (2d) 562.

This Court in the Wilcox case held that for funds to be taxable there must be (1) the presence of gain or right to the alleged gain, and (2) the absence of a definite unconditional obligation to pay or return that which would otherwise constitute a gain. The Court concluded, of course, that embezzled funds did not meet those tests and were not taxable.

The Court of Appeals in its majority opinion says (Opinion—App. p. 35):

> "We see no possible distinction between this case and the Wilcox case with reference to the existence of

a bona-fide, legal or equitable claim to the money. Appellant, like Wilcox, had no bona-fide claim."

The Court goes on to say that the obligation to repay differed from that in the Wilcox case only in point of time. This latter attempted distinction is made by the Court based on its conclusion that the obligation of petitioner to pay Stokely the amount received from the sale of its by-products was delayed while petitioner reported to Stokely and they sent a memorandum based thereon to petitioner. From that the opinion concludes that petitioner had "the right of control, use and dominion over the funds during the interim," whereas, the Court concludes that the obligation of Wilcox to pay was instantaneous (Opinion—App. p. 35). That is the only distinction made by the majority opinion between the Wilcox case and the case of the petitioner, and the concurring opinion of Judge Johnsen does not find even any "narrow line of demarcation" (Opinion—App. p. 41). Actually the evidence in this case does not show any right of use or dominion in petitioner to the Stokely money at all. All the evidence was that the by-products belonged to Stokely; that petitioner had no interest therein; that petitioner was to sell the by-product for Stokely's account and that he was to remit the proceeds in full (R. 128-129, 121-122, 144-145). This Court's opinion in the Wilcox case points out that Wilcox as bookkeeper collected certain funds due his principal, that he did not make an entry thereof or turn the money over to his principal, but that he retained the money and lost it gambling. He embezzled the funds. In the case at bar the evidence was that petitioner sold some of Stokely's property; that he was to report and remit the same in full; that he did not do so; that he lost the money gambling and that he had no right to the money, had no right to use the money, and that under Missouri decisions what he did amounted to embezzlement.

The decision of the Court of Appeals also is in conflict with decisions of other Courts of Appeal which have held that embezzled funds are not taxable to the taxpayer. See Commissioner of Internal Revenue v. Turney, 5 Cir., 82 F. (2d) 661; McKnight v. Commissioner of Internal Revenue, 5 Cir., 127 F. (2d) 572.

(2) This decision involves an important question of Federal law, namely, the question of whether embezzled funds constitute taxable income under Section 145 (b), Title 26, U. S. C., concerning which question there is confusion and conflict which should be settled authoritatively by this Court.

The majority opinion of the Court of Appeals says (Opinion—App. p. 33):

> "We find it difficult to reconcile the Wilcox case with the later opinion of the Supreme Court in Rutkin v. United States, 343 U. S. 130. Since four members of that Court were unable to do so, we shall not attempt to do so * * *."

The concurring opinion of Judge Johnsen (Opinion—App. p. 38) says:

> "I don't think anyone can be absolutely sure, on the basis of the Rutkin case, 343 U. S. 130, 72 S. Ct. 571, 96 L. Ed. 833 and the Wilcox case, 327 U. S. 404, 66 S. Ct. 556, 90 L. Ed. 752, just what the law objectively is or the general question that is here involved."

Subsequently Judge Johnsen says (Opinion—App. p. 41):

> "I have always felt that our decision in Kurrle v. Helvering, 8 Cir., 126 F. (2d) 723, which preceded the Wilcox case, was sound, and that of necessity there would ultimately have to come a return to that position."

In other words, Judge Johnsen says that the Wilcox case is incorrect and unsound and should be abandoned. The majority opinion draws what Judge Johnsen refers to as a "narrow line of demarcation" (Opinion—App. p. 41). Both opinions by their statements point up the fact that they are in doubt as to law on this subject in spite of the fact that the Rutkin decision recognized the Wilcox case as still being the law with reference to embezzled funds (this Court also cited the Wilcox case in Alison v. U. S., 344 U. S. 167, and in U. S. v. Lewis, 340 U. S. 590, the Alison case having been decided since the Rutkin case).

In 1946 the Chief Counsel of the Bureau of Internal Revenue, G. C. M. 24945, Internal Revenue Cumulative Bulletin, 1946-2, held:

> "The mere act of embezzlement does not of itself result in taxable income to the embezzler for Federal income tax purposes. If the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case."

The above opinion has never been rescinded and is still outstanding as the opinion of the Chief Counsel of the Bureau of Internal Revenue. During the nine years since the decision of this Court in the Wilcox case, Congress has not seen fit by legislative enactment to change the law as interpreted by the Wilcox case. Numerous tax services recognize that under the Wilcox decision, embezzled funds are not income to the taxpayer. See Federal Tax Coordinator (prepared by the Research Institute of America), Vol. 1, page 4007, par. D-6; also Rabkin and Johnson Federal Income Gift and Estate Taxation, Vol. 1, page 1226, par. 12.03 (10). On the other hand, in the recent case of Kann v. Commissioner of Internal Revenue, 3 Cir., 210 F. (2d) 247, the majority opinion differentiates the facts from the Wilcox case, emphasizing the distinction

that, whereas, Wilcox was merely a salaried employee, the taxpayers in the Kann case controlled the concerns from which the money was improperly taken. A strong dissenting opinion by Judge Kalodner expresses the view, however, that the case was inconsistent with the Wilcox case. In the case at bar, the Court of Appeals expresses doubt as to the state of law on this subject. If its opinion is permitted to stand without being reviewed by this Court, especially in view of the language expressing doubt as to the law, the conclusion would seem to be inevitable that the decision of the Court of Appeals in this case would be construed to be contrary to the Wilcox case and in effect to nullify the rule of the Wilcox case. At the same time, the latest pronouncements of this Court would still indicate the Wilcox case to be the law. It is submitted that the foregoing do indicate confusion and uncertainty, and that under such circumstances this Court should issue the writ and finally and authoritatively reaffirm the fact that the Wilcox case is sound and continues to be the law. As pointed out hereinbefore, the facts in this case are about as close to those in the Wilcox case as will ever be found in two different cases, and if the opinion of the Court of Appeals reaching a result contrary to the result in the Wilcox case is permitted to stand, the result would seem to be that the rule of the Wilcox case is limited not to cases involving facts of that character but rather is limited to the decision in the Wilcox case itself.

(3) Aside from the fact that the opinion of the Court of Appeals conflicts with the Wilcox and other decisions on whether embezzled funds constitute taxable income, it erroneously upholds the exclusion of evidence which was vital to petitioner's defense and deprived him of rights to which he was entitled.

The Court's opinion (Opinion—App. p. 37) approved the act of the Trial Judge in excluding the testimony of

Charles R. English, the certified public accountant. His testimony would have shown the amount of funds belonging to Stokely which petitioner collected in 1946, but which he did not remit to them (R. 245-246). This evidence was based upon the examination of the books and records in evidence which were in the Court Room and which were voluminous, plus parol testimony heard by witness English. The Court of Appeals recognized that under ordinary circumstances such documentary evidence would be admitted, but concludes that this would have shown only the amount of embezzled funds and since the Court says that they were taxable income to petitioner it concludes that the exclusion of that evidence was immaterial (Opinion—App. p. 37). Actually under the Wilcox case the evidence was material and vital since it would have shown a sum greater than the amount of income claimed by the Government as unreported (R. 245-246, 112, 119). The jury had no way of getting that information or realizing that fact from any other source unless they would go through all of the voluminous records and establish that fact themselves which obviously would be an impossibility and which they did not do.

In addition the testimony of witness English was admissible for a further reason. It was undisputed that there was an absolute obligation on petitioner to pay to Stokely the sums which he collected from the sale of their by-products (R. 121-122, 128-129, 144-145). Under the evidence, petitioner's return was on a hybrid basis in which the certified public accountant who prepared the return unquestionably took into account unpaid accounts payable which he accrued and deducted in making the return (R. 25-26). Even if it be concluded that it is proper for petitioner to include in his receipts and in his tax return the amounts which he received from the sale of Stokely property, still in order to arrive at his net taxable income and the amount of income due it would have

been necessary to have deducted his unpaid obligations to Stokely for the amount which he collected but did not remit to them. The testimony of accountant English would have disclosed that amount to have been approximately Forty Thousand Dollars ($40,000.00) (R. 245-246), for which no deduction was taken in his tax return. That was an amount exceeding the amount of claimed additional unreported income under the Government's case (R. 112, 119).

(4) The opinion of the Court of Appeals in holding that it was not error to refuse to charge the jury that petitioner could not be convicted if no additional tax was due, is in conflict with other opinions of Courts of Appeal which hold that a defendant may not be convicted under Section 145 (b), Title 26, U. S. C., in the absence of proof that the defendant owed more tax.

The Trial Court charged the jury as follows (R. 277-278):

> "If the defendant had taxable income, as shown on unrecorded dray tickets, and he intentionally caused it to be omitted from his tax return, for the period in question, and if you find the defendant did this with the intent to defraud the Government of the tax due on such omitted income, then he has violated the statute I read to you, and you should find a verdict in this case accordingly."

The Court tells the jury under the above that if petitioner had taxable income entered on dray tickets which was not put in his tax return, and if they find intent to defraud, the petitioner should be convicted. That is contrary to various decisions of Courts of Appeal holding that the defendant may not be convicted absent proof that he actually owed more tax than he paid. See United States v. Schenck, 2 Cir., 126 F. (2d) 702; and Gleckman v. United States, 8 Cir., 80 F. (2d) 394. The defendant had

specifically requested such an instruction and excepted to the failure of the Court to give such an instruction (R. 292, 295). Petitioner was entitled to that charge, and its refusal denied him a proper trial.

(5) The decision by the Court of Appeals holding that it was not error for the Trial Court to overrule petitioner's plea of double jeopardy under the Fifth Amendment to the Constitution of the United States involved such a fundamental question and, according to petitioner's views, was decided in such an erroneous manner as to call for a review by this Court and the exercise of its power of supervision.

In the recent case of United States v. Whitlow, 110 F. Supp. 871, Judge Holtzoff has reviewed many cases dealing with the plea of double jeopardy and the historical application of that rule to cases where a mistrial is ordered by the Court and an attempt is made to try the defendant again. As he there states, the question arises as to when and under what circumstances the Court may terminate the trial without a request by or approval of the defendant.

In that opinion Judge Holtzoff points out, l. c. 872, that:

> "Ordinarily a defendant in a criminal case has the privilege, granted to him by the above-mentioned clause of the Constitution, of securing a verdict from the jury originally impaneled and sworn to try him. This guaranty is no mere technicality, but constitutes a substantial right. It not only safeguards the defendant against being put to the agony, expense and trouble of a second trial, but it also entitles him to secure a verdict from the particular jury that has started to hear the case. This privilege may prove at times very valuable, because the defendant may feel that the jury which is trying the case may be more

favorably disposed to him than some future jury might be."

The Courts of the United States have recognized that when a sufficient period of deliberation has occurred and the jury has become hopelessly deadlocked, the Judge has the discretion to discharge the jury and order a new trial, but as Mr. Justice Story stated in United States v. Perez, 9 Wheat. 579, 22 U. S. 579:

> "To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes * * *."

For cases in which defendant was discharged for double jeopardy even though jurors had stated they could not agree, see 1 Wharton's Criminal Law, page 548, par. 395, note 61, and cases therein cited.

In this case the jury had been out only two hours when it went to dinner (R. 14-15). It returned from dinner, and in about an hour and a half was back in the Court Room for answers to questions they submitted to the Court (R. 15), and in another two hours the jury was back in the Court Room for the proceedings which led to their discharge (R. 18). At that time the jury had deliberated about five and one-half hours in a case that had taken six days to try.

When the jury came in at 11:20 P. M. they were not discharged immediately as a result of their saying they were hopelessly deadlocked. They were not even asked if they thought they would reach a verdict if they deliberated longer or were excused or sent to bed for the night and resumed their deliberation the next morning. They were not kept out nearly as long as juries are usually kept out in the District Court of St. Louis in cases requiring a comparable amount of time for the trial.

Instead, the Court started out with substantially the first portion of what is referred to by lawyers as a mallet or hammer instruction. Allen v. United States, 146 U. S. 492; United States v. Allis, 73 F. 165, l. c. 182, affirmed 155 U. S. 117; Boehm v. United States, 123 F. (2d) 791, certiorari denied 315 U. S. 800, rehearing denied 315 U. S. 828. After giving a part of that instruction the Court then addressed a question to Mr. Murray, the foreman, and said, "Pay close attention," and "Answer it in the exact way I am going to tell you." Then the Court proceeded to ask how they stood numerically, but without telling him how they stood as between the Government and the defendant or, in other words, on the question of conviction versus acquittal (R. 18). These cautionary instructions and request for the ratio of difference without giving the number for conviction and for acquittal were immaterial if the jury was to be discharged at that time for being hopelessly deadlocked. It would make no difference in that event how they stood or whether they were for conviction or acquittal, and there would have been no occasion to tell the foreman to pay close attention or to answer the question in the exact way he was told to answer. After Mr. Murray gave the answer that they stood eight for conviction and four for acquittal, the Court then said: "That is precisely what I told you not to tell me," and "Very well, you will be discharged" (R. 19). The defendant and his counsel did not ask that these questions be asked, did not complain of the information elicited, and were not consulted as to what should be done, and had no opportunity to be heard. The question was asked, the answer given, and the jury immediately discharged.

Petitioner had undergone a trial lasting six days, a long, arduous and expensive trial. The jury had been out a relatively short length of time. We submit that if juror Murray had not answered as he did, the rest of the mallet

instruction would have been given and the jury would have continued its deliberation, and that the transcript as to what had occurred at the time clearly so shows.

While the Trial Judge, under our decisions, has the right, if a jury becomes hopelessly deadlocked, to discharge it for that reason when, in his sound discretion, that should be done, he does not have the right of his own volition to discharge a jury because it discloses how it stood on the question of conviction or acquittal in response to a question by the Court. When that was done in this instance, the petitioner was deprived of his right to have the jury continue its deliberations and attempt to reach a verdict. A substantial number of jurors favored acquittal and might well have persuaded the remainder of the jurors to a like conclusion. As Judge Holtzoff said, that is not a mere technicality but a substantial right. It safeguards the defendant from being put to the agony, expense and trouble of a second trial. Having been deprived of that right, the defendant was entitled to be discharged for prior jeopardy on his motion presented to the Court on October 12, 1953.

In discussing petitioner's plea of double jeopardy, the opinion of the Court of Appeals (Opinion—App. pp. 36-37) refers to and contains a statement by the Trial Judge with reference to the reason for discharging the jury on July 6, 1953, and says that:

> "Upon the record before us we accept his statement."

We believe that the Court overlooked the fact that this memorandum by the Trial Judge was entered on October 23, 1953, which was a little more than three and one-half months after the incident occurred and we reiterate that the record of what occurred at the time is rather clear and expressive as to what occurred and prompted the events

and action taken, and we respectfully submit that the record written at the time ought to prevail over recollection three and one-half months later which was a week and a half after the plea of double jeopardy had been filed and overruled and was after the conclusion of the second trial.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 14,976.

Arthur H. Marienfeld, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri

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[July 12, 1954.]

Harry C. Blanton and James A. Finch, Jr., for Appellant.

W. Francis Murrell, Assistant United States Attorney (Harry Richards, United States Attorney, and Max H. Goldschein, Special Assistant to the Attorney General, Department of Justice, were with him on the brief), for Appellee.

Before Sanborn, Johnsen and Collet, Circuit Judges.

Collet, Circuit Judge.

Appellant was convicted of willfully attempting to evade his income taxes by filing a false income tax return for the year 1946. His defense was that the money received by him

that year which he did not report was money he embezzled and hence was not his income. The trial court filed a memorandum opinion in ruling on the motion for new trial. In that opinion appears the following statement of many of the salient facts:

"The defendant was in the business of selling beef and pork at wholesale under the name of Mar Meat Company, and in his meat operations engaged in a boning operation of beef and pork carcasses delivered to him by the Stokely-Van Camp Company (herein referred to as 'Stokely'). Stokely had a contract with the Government to put up canned meat rations for the Army. It used the boned meat for that purpose. After defendant boned the meat delivered to him by Stokely, the meat was shipped to Stokely for canning. For the boning operation defendant received payment from Stokely on a pound basis. Stokely furnished the packing materials, paid the freight, and paid the storage charges on boned meat that went to cold storage.

"In the boning operation there were certain by-products that could not be used in Army rations. Defendant was authorized by Stokely to sell these by-products for the 'account' of Stokely. The by-products were 'bones, suet, kidneys, skin, shank meat, ox joints and tenderloin.' Defendant did sell these. The tenderloin, in some instances, was converted by defendant into hamburger before sale. In making hamburger suet was added. Stokely did not authorize or have knowledge of the use of by-products, by defendant, to make and sell hamburger. Much of Stokely's meat after boning went to cold storage. The tenderloin which defendant made into hamburger was, for the most part, also placed in storage. Stokely's boned meat was placed in storage in its name, as Stokely had directed. The hamburger made from tenderloin was put in cold storage by defendant in his name without the knowledge of Stokely.

"Defendant, needing more money than he could honestly make, conceived a plan to get some of it out of the boning operation being done for Stokely. Defendant proceeded to sell a part of the by-products and withheld information of such sales from Stokely by keeping and sending false reports to Stokely. Income from such sales went into defendant's personal bank account and was used by him for personal purposes. All customers required a record of their purchases. Defendant furnished such a record by using 'dray tickets,' but kept off his office records any reference to such sales. The purchasers of meat products were unaware of defendant's fraudulent scheme. Defendant used dray tickets in each sale involved in his fraud on Stokely. The dray tickets so used, unlike those used in legitimate transactions, were unnumbered. Defendant's bookkeeper testified to the practice. Defendant did likewise. The bookkeeper testified that at defendant's direction, when money came into the office, collected on the unnumbered dray tickets, he made no record of it but delivered the money to defendant. Defendant used the same method of getting funds in the sale of both converted by-products of Stokely and unconverted by-products of Stokely. He used the same kind of unnumbered dray tickets in sale of products that were not Stokely by-products, which were not recorded on his books.

"The income on these unrecorded dray tickets represented the income which the Government claims defendant failed to report in his income tax return, knowingly and with intent to defraud the Government of the tax on the sums of money. Such is the basis of this prosecution.

"The record shows, and defendant admitted, that the income was not shown on defendant's books. It was from defendant's books that his tax returns were made by an auditor. The auditor testified he did not receive any unnumbered dray tickets from the defendant to use in making

defendant's returns for the period covered by the prosecution. This testimony was not disputed by the defendant while he was on the stand. And although defendant took the stand as a witness, he did not elect to testify to the events surrounding the preparation, signing and filing of the tax returns claimed by the Government to be fraudulent."

In addition to money kept by appellant in the manner detailed above, he also in many instances reported by-products as having been sold for one price, when, in fact, they were sold for a higher price. He only remitted the lesser amount. Also, he charged Stokely for more packaging materials than he used.

In the charge to the jury, all money received by appellant, other than money received from the sale of by-products on unrecorded dray tickets, was eliminated from the jury's consideration.[1] In defining what would constitute income to appellant, the court charged the jury as follows:

"Now, generally speaking, unlawful money gains, as well as lawful ones, may constitute taxable gains when the taxpayer and recipient of money has such control over the money, as a practical matter, that he readily realizes economic value from it. This occurs when cash is delivered by its owner to the taxpayer in a manner which allows the taxpayer freedom to dispose of it at will. The money received may have been obtained by unlawful means, such as by fraud, converting property of another and processing and selling it and retaining the proceeds, even though the

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[1] "The sums represented by these unrecorded dray ticket sales are the sums which Government claims the defendant intentionally omitted from his tax return, as to the period charged in the indictment, namely, 1946, with the intent to defraud the Government of the tax due thereon. No other money which has been mentioned in evidence will be considered by you as making up such amount so claimed by the Government to be omitted from the defendant's 1946 tax return."

taxpayer might be liable to a claim from the owner of the original property for its cost price or some other consideration."

The court then instructed the jury that money obtained by appellant from the sale of by-products in their original state was not taxable income to him and he was not required to report it, but that if appellant took tenderloin or other meat products and converted it into some other product, such as meat ground into hamburger, and sold the converted product, the income from such sales was income to appellant which should have been reported.[2] (In the memorandum opinion the court concluded that all receipts from by-products, whether converted into other products or not, were taxable income of appellant.) Since appellant admitted the conversion of a large quantity of by-products, their sale, the retention of the proceeds of such sales, and his failure to report such receipts as income, and since the proceeds from such sales constituted a substantial sum, in effect, the only question left to the jury was the question of willfullness.[3]

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[2] "Now I say to you, as to the money which the defendant obtained by the sale of by-product from boning the Stokely meat, that money belonged to Stokely and not to the defendant, and that money was not taxable income to the defendant, and he was not required to report it on the income tax return; but if the defendant took tenderloin or other meat products, the property of the Stokely Company, which he was authorized to sell as tenderloin or in its original form, and converted it into some other product, such as meat ground into hamburger, without authority from Stokely—as I recall the testimony, there is no such authority in the evidence, from Stokely—and then sold the converted products, the income from such sales is income to the defendant which should have been reported in his tax return for 1946 for the income of that character which he received during that year."

[3] In the same connection the jury was further charged as follows: "If you find from the evidence that these unrecorded dray tickets correctly describe the products listed—and Mr. Jost testified they did, and defendant's counsel was careful to develop during the testimony of the various witnesses that they did correctly list the prod-

Thus the primary question for determination arises—was the income received from the sale of the converted by-products reportable income of appellant or was it Stokely's money which appellant did not obtain such a proprietary interest in or dominion over as to constitute it income to him.

Appellant says that since his acts in question were committed in Missouri, the law of Missouri should be applied in determining the legal effect of those acts; that such acts amounted to embezzlement under Missouri law,[4] and hence under the doctrine of **Commissioner v. Wilcox,** 327 U. S. 404, the embezzled funds were not income to appellant. But the present question is not whether appellant was guilty of embezzlement under the law of Missouri, but whether the funds he received were his income under the Act of Congress defining taxable income. State law will not be decisive in that determination. **Daine v. Commissioner,** 168 F. 2d 449, 451. As stated in the **Wilcox** case:

> "Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of § 22 (a)."

Although in the **Wilcox** case the opinion refers to the fact that under the law of Nevada the embezzlement was complete when the appropriation was made and that under Nevada law the rightful owner was entitled to replevy the money or have it summarily restored as soon as it was appropriated, we do not understand the opinion to hold

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ucts—then the income from the sale of meat products other than the by-products which the defendant was authorized to sell is income to the defendant which he should have included in his income tax return."

[4] Secs. 560.250, 560.260, R. S. Mo. 1949.

that the varying local law of different states will determine for federal income tax purposes what shall be treated as taxable income under the federal income tax laws.

We find it difficult to reconcile the **Wilcox** case with the later opinion of the Supreme Court in **Rutkin v. United States**, 343 U. S. 130. Since four members of that court were unable to do so, we shall not attempt to do so, but will apply the reasoning of both cases in reaching a solution to our present problem.

In the **Wilcox** case the court approved the previously declared criterion for determining taxable income as depending "upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis." And further—"In fact, no single, conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of an income tax. No more can be said in general than that all relevant facts and circumstances must be considered."

The **Wilcox** case was a clear-cut case of embezzlement. The taxpayer was a bookkeeper who collected money due his employer and immediately pocketed it. The court held that under the foregoing general criterion the money was clearly embezzled funds of the bookkeeper's employer and not the bookkeeper's income.

In the **Rutkin** case the court reiterates previous expressions of the court (also found in the **Wilcox** opinion) that Sec. 22 (a), cast in broad sweeping terms, "supports the declarations of this court that Congress in enacting that section [Sec. 22 (a)] exercised its full power to tax income." The court laid down the criterion in the **Rutkin** case in the following language:

> "An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such con-

> trol over it that, as a practical matter, he derives readily realizable economic value from it. **Burnet v. Wells**, 289 U. S. 670, 678; **Corliss v. Bowers**, 281 U. S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it."

Assuming from the jury's verdict, under the instructions given that the money receipts involved had been extorted by the taxpayer upon a threat to kill payor and his family, the court held without qualification that money obtained by extortion was taxable income to the extortionist under the clause of Sec. 22 (a):—"* * * and income derived from any source whatever." We deem it noteworthy that in reaching the foregoing conclusion the court stated:

> "Petitioner's [the extortionist's] control over the cash so received was such that, in the absence of Reinfeld's [the payor's] unlikely repudiation of the transaction and demand for the money's return, petitioner could enjoy its use as fully as though his title to it were unassailable."

This latter expression demonstrates the application in the **Rutkin** case of the principle stated in **Commissioner v. Wilcox**, heretofore quoted, that all relevant facts must be considered and no conclusive criterion has been found to determine all situations. Since the court in **Commissioner v. Wilcox** flatly held that embezzled funds were not taxable income to the embezzler and in the **Rutkin** case has unequivocally held that extorted funds were taxable income to the extortionist, the line of demarcation lies between those rather closely related factual situations and must be determined by the facts in the individual case.

The only distinction apparent to us between the facts in the present case and those in the **Wilcox** case is that the

obligation of appellant to pay Stokely for the by-products was, under the oral agreement and the practice followed, deferred until appellant had made a report showing the amount due Stokely and a statement had been rendered by Stokely to appellant for that amount, with the right of control, use and dominion over the funds during the interim, whereas in the **Wilcox** case the bookkeeper was under the immediate and instantaneous legal obligation to pay to his employer the money collected for the latter. In the **Wilcox** case the court lays down two requisites before the taxable gain may exist. First, "the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of § 22 (a)." Under the facts in this case, the agreement and the practice above referred to gave to appellant a purely temporary claim of right to the proceeds of the sale of the by-product, i. e., until the report was made and the statement was rendered. But we see no possible distinction between this case and the **Wilcox** case with reference to the existence of a bona fide legal or equitable claim to the money. Appellant, like Wilcox, had no bona fide claim. And the obligation of appellant to repay differed from that of Wilcox only in point of time.

The only factual distinction we find between the **Rutkin** case and the **Wilcox** case is that Rutkin extorted the funds in question under such circumstances that his "control over the cash so received was such that, in the absence of Reinfeld's unlikely repudiation of the transaction [the extortion] and demand for the money's return, petitioner could enjoy its use as fully as though his title to it were unassailable." The obligation to return was the same as in the **Wilcox** case. The obligation of an extortionist to

return funds so taken and that of an embezzler is equally existent. Nor was there any bona fide legal or equitable claim to the money Rutkin extorted. The nature of appellant's possession, dominion over, opportunity for use of, and freedom to dispose of the funds in question is more synonymous with that existing in the **Rutkin** case. In our judgment this case is controlled by the **Rutkin** case. There being no dispute of fact about appellant's relation to the funds, there was no factual issue in that regard for the jury to determine and the instruction was proper. The question of the willfullness of the appellant's acts was properly submitted and not now complained of.

Appellant interposed a plea of double jeopardy which was overruled. This was the second trial. At the first, after the jury had been considering a verdict for several hours, the foreman sent the trial judge a note stating it was hopelessly deadlocked. It was called to the courtroom and asked in what proportion they were divided, after being cautioned not to indicate how either group was voting. The foreman answered that it stood eight for conviction and four for acquittal; they were immediately discharged. In overruling the plea the court stated:

"The court finds and declares that the jury was discharged on July 6th, 1953, because of the contents of the note above referred to and the inability of the jury to agree upon a verdict. The inquiry made by the Court was collateral to the reason of the jury. The jury had informed the Court that they were hopelessly deadlocked, apparently at eight to four, and could not reach a verdict.

s/ Rubey M. Hulen,
Judge."

The motion incorporating the plea of double jeopardy called for the outright discharge of appellant. It necessarily did not and could not present any question of error arising in the second trial from which this apeal is taken.

The inquiry was ill-advised, under authority of **Nigro v. United States** (CCA 8, 1925), 4 F. 2d 781, yet it is the well-established rule, as appellant concedes, that a trial judge has the discretion to discharge a jury when it has become hopelessly deadlocked. The trial judge is the only person who can know why he discharged the jury. He states in the memorandum quoted that it was because of the jury's inability to reach a verdict. Upon the record before us we accept his statement. The record furnishes ample ground for the discharge of the jury upon that ground. This assignment must therefore be held to be without merit.

Complaint is made of the action of the trial court in excluding an audit made by appellant's accountant which showed the total amount of funds withheld by appellant, owing to Stokely, exceeded the amount which the Government claimed appellant unlawfully failed to report. The audit was presumably made from the exhibits which were in the courtroom, available to inspection by the Government. Under ordinary circumstances such a summarization of voluminous documentary evidence should be admitted. But since this evidence only went to show the amount of the funds which appellant claims were embezzled and hence not taxable income, that question was immaterial in the light of the fact that the funds were taxable income. The same is true of the exclusion of evidence tending to show appellant's acknowledgment of Stokely's rightful ownership of the unreported funds and his repayment of a portion thereof after the return of the indictment in this case.

On cross-examination appellant was asked and required to answer questions disclosing that he had failed to report more and different income than charged in the indictment. He contends that rules of proper cross-examination were violated and that he was forced to give evidence against himself. We find no error in the admission of this testi-

mony. Appellant testified in considerable detail and extent that he fraudulently withheld from Stokely as much or more money than he was charged with failing to report. He thereby voluntarily furnished evidence that he failed to report taxable income, if the money belonging to Stokely which he withheld was taxable to him. He did so in order to exonerate himself from willfully attempting to evade taxes on his income. The only injury which could result to him from this testimony, in the event the funds he testified about fraudulently withholding were taxable to him, was to indicate that his intent in failing to report his income was willful. Upon that ground this testimony was admissible. **United States v. Manton**, 107 F. 2d 834, 845.

An instruction was requested and refused to the effect that appellant could not be convicted if no additional tax was due. Error is assigned on account of its refusal. Only in the event the unreported receipts were not taxable could this instruction be appropriate. Since they were taxable, the refusal of this instruction was not error.

Finding no error, the judgment is affirmed.

Johnsen, Circuit Judge, concurring specially.

I don't think anyone can be absolutely sure, on the basis of the **Rutkin** case, 343 U. S. 130, 72 S. Ct. 571, 96 L. Ed. 833, and the **Wilcox** case, 327 U. S. 404, 66 S. Ct. 546, 90 L. Ed. 752, just what the law objectively is on the general question that is here involved.

In the **Rutkin** case, the Court seems to have analogized extortion into the category of fraud, for tax purposes, saying that "it would be an extraordinary result to hold here that petitioner is to be tax free because his fraud was so transparent that it did not mislead his victim and his victim

paid him money because of fear instead of fraud." 343 U. S., at page 138.

The use of such a broad analogy would make it possible to regard any funds criminally acquired from another—whether through extortion, embezzlement, larceny, robbery, burglary or other similar means—as constituting in a sufficient sense fraud proceeds, to entitle them to be so treated in their tax consequence. But if the Court intended this to be the significance of the **Rutkin** case, there would have been no occasion for it to have left the **Wilcox** case standing as one of tax non-liability, and to say of it, as it did in the **Rutkin** opinion, supra, ibid., that "We limit that (embezzlement) case to its facts."

If the **Rutkin** case and the **Wilcox** case are not inconsistent, there must exist some basis on which to distinguish the difference in the treatment of the funds involved. Is there any distinction that can be made between them in relation to the use and enjoyment which Rutkin and Wilcox, respectively, had of the illegally acquired funds? There is none. Each had the full use and enjoyment of the funds in terms of economic value. Did the Court then mean to imply that there was a difference by virtue of the fact that in the **Rutkin** case, as in a fraud situation, the victim had himself turned over the money to the criminal for the latter's use, while in the **Wilcox** case he had not?

That difference would have the effect of making a hold-up man subject to income tax, who permitted his victim to hand over his bill-fold, while leaving without tax liability one who compelled his victim to put his hands in the air and himself engaged in stripping the victim's pockets. Certainly Rutkin's victim, who testified that he paid the extortion funds to protect himself and his family from the danger of being shot, 343 U. S., at page 134, was not any more voluntarily or willingly doing so than would be a hold-up victim in gladly handing over his bill-fold to save

his life. The fact, therefore, that in the **Rutkin** case the victim had turned over the money to the criminal as the latter's own, and in the **Wilcox** case he had not, does not, in my opinion, afford any rational basis for distinguishing the two cases in their tax consequences.

If criminally acquired funds are at all to be subjected to tax liability—and I think they should be, just as much as any other economic gains, both as a tax matter and as a matter of justice and of deterrence in either individual or organized crime—that liability, it seems to me, can only and needs only to be predicated upon the simple and solid basis under the statute of actual economic gain, value and enjoyment having existed to the criminal. One who acquires funds by criminal means and uses them for his own purposes has had no less measure of economic gain, value and enjoyment from them than the law-abiding citizen can hope to obtain from the funds which he acquires in honest pursuits.

Tax liability necessarily is an economic, not a moral, question. No prostitute, narcotics peddler or anyone else can escape the payment of income tax upon any earnings on moral grounds. No more should an embezzler, a thief, a robber, a burglar or any other criminal be permitted to go tax free or be immune from prosecution for evasion upon the moral or legal basis that the money which he acquired was not technically his own but his victim's, as against the economic realities of the funds having been taken by him with intent to appropriate and enjoy them as his own, with such utilization and enjoyment actually having been made of them by him, and with him thus being left in the position of not being able to restore them as the identical object taken. As a tax matter, when these economic realities have existed, it also cannot affect the situation, I think, that the criminal may be able and may undertake, after he has been caught up with, to pay back

the amount of his illegal acquisition, in funds not constituting the identical object which he took.

I have always felt that our decision in **Kurrle v. Helvering**, 8 Cir., 126 F. 2d 723, which preceded the **Wilcox** case, was sound, and that of necessity there would ultimately have to come a return to that position. The **Rutkin** case is not capable of any practicable application or workability if it is to be used merely to make artificial refinements in fact situations to escape the **Wilcox** case. And so I would not rest our decision in the present case on any narrow line of demarcation between whether appellant had an immediate or a deferred obligation to account for the funds which he collected. In either event, he misappropriated the funds, and the economic gain, value and enjoyment which he received resulted from the fact of that misappropriation.

I would affirm the conviction and sentence here upon the general basis which I have discussed above. The **Rutkin** case and any other attempt to impose tax liability for economic gain and enjoyment from criminally acquired funds can only soundly be made to rest on that ground.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.